No. 74-1595

In the Supreme Court of the United States

OCTOBER TERM, 1975

HY BROSTEN,

Petitioner

vs.

CITY OF PARK CITY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND JUDICIAL DISTRICT

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The opinion of the Court rendered upon entry of the judgment for which review is sought is reported *sub nom. Park City* v. *Brosten*, 24 Ill.App.3d 442, 321 N.E.2d 15.

Statement of Jurisdiction

The judgment of the Appellate Court of Illinois in this cause was entered on December 12, 1974. A timely petition for rehearing was denied on January 8, 1975. A timely petition to the Supreme Court of Illinois for leave to ap-

peal was denied on March 21, 1975. The statutory provision believed to confer on this court jurisdiction to review the judgment in question by writ of certiorari is Title 28, United States Code, Section 1257(c).

The Questions Presented for Review

Whether the petitioner has been deprived of his liberty and property without due process of law by virtue of the enforcement against him of an injunction commanding him to cease his business of operating an auto salvage yard where the trial court held him in contempt for disobeying the injunction in proceedings wherein no evidence was taken, where the trial court refused to hear evidence of the petitioner's good faith attempts to comply with the licensing ordinance involved.

Constitutional Provision Involved

United States Constitution, Fourteenth Amendment:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case

Petitioner Hy Brosten d/b/a Hy Way Sales owns certain real estate situated within Park City, Illinois.

On May 27, 1969, respondent, Park City filed a complaint against Brosten in the Circuit Court of Lake County, Illinois, General Number 69 CH 107 which charged that

Brosten was engaged in the junk yard business within the City of Park City without having obtained a proper license. (Tr. C-3)

A decree filed May 31, 1971 in the Circuit Court of Lake County, Illinois in the Case No. 69-CH-107 provides as follows: (Tr. C-31)

> 1. That the Court has jurisdiction of the parties hereto and subject matter hereof.
>
> 2. That the Plaintiff has proved the allegations of its Complaint, and the equities in this cause are with the Plaintiff.
>
> 3. That the Plaintiff is entitled to the issuance of a permanent injunction against the Defendant as requested in said Complaint.
>
> 4. That the parties have entered into this agreed Order, a record of the Stipulation being made before the Court.
>
> 5. That the Defendant operates the business sought to be enjoined in the City of Park City, within an area bounded on the North by Illinois State Route 120 (also known as Belvidere Road), on the South by Eighth Street as extended, on the East by Chestnut Street, and on the West by the Chicago & North Western Railway right of way, all in the City of Park City, Illinois.

Wherefore, it is ordered, adjudged, and decreed by the Court as follows:

1. That the Defendant, Hy Brosten, d/b/a Hy-Way Sales, his agents, employees, and successors, and each and every one of them be, and they are hereby perpetually restrained and enjoined from operating

a junk yard, automobile salvage, or automobile graveyard business on the premises herein above described.

2. That said permanent Writ of Injunction be stayed until November 1, 1972, and that thereafter, the Clerk of this Court shall forthwith issue a permanent Injunction Writ in accordance herewith.

3. That a mandatory Writ of Injunction be issued requiring the Defendant, Hy Brosten, d/b/a Hy-Way Sales, to clean up the premises any wrecked, dismantled automobiles, batteries, tires, rubber, debris, or parts of automobiles or vehicles before November 1, 1972, and that after said date that the Clerk of this Court shall issue said Injunction Writ.

4. That this decree is no way intended to affect the existing zoning on the property above described.

5. That this Court shall maintain the jurisdiction of this cause until the terms of this decree are fulfilled.

Thereafter Brosten filed a petition in the trial court seeking to vacate the above decree. This petition claimed a material mistake of fact on the part of Brosten which vitiated the agreement upon which the decree was based in that Brosten set forth that he had intended to move his business on to an adjoining parcel of land also owned by him but not within the city limits of Park City. However, Brosten stated, since the agreement he had learned that the forest preserve district of Lake County, Illinois, was about to commence proceedings to condemn that property.

Park City moved to strike the petition to vacate and the trial court ordered it stricken. An appeal from that order was taken and the Appellate Court of Illinois, Second District, affirmed. 6 Ill.App.3d 474, 285 N.E.2d 528. (Opinion published in abstract only.)

On January 30, 1973 an order was entered commanding that the Writ of Injunction be issued pursuant to the Decree of May 31, 1971. (Tr. C-36) On March 8, 1973, the City of Park City presented a petition stating that Brosten had failed to comply with said Writ and requested that the Court enter a rule to show cause why he should not be held in contempt for failure to comply with the Injunction Writ entered on January 30, 1973. (Tr. C-35)

On March 8, 1973, an order was entered for a rule on appellant to show cause why he should not be held in contempt of the Court, said rule being made returnable on March 29, 1973. (Tr. C-40)

On April 2, 1973, an order was entered by Hon. Fred A. Geiger which recited as follows: (Tr. C-44)

> On a rule to show cause on the respondent Hy Brosten, and the same having been made returnable on the 29th day of March, 1973 and the same being continued to this day, and the respondent appearing in person and with his attorney Richard Drew and said respondent Hy Brosten failing to show cause why he should not be held in contempt, and the Court finding that said Hy Brosten is in contempt of the Order of this Court and the injunction writ issued thereon.
>
> It is therefore ordered that said respondent Hy Brosten be and he is hereby committed to the custody of the Sheriff of Lake County, Illinois to be confined to the County Jail until he purges himself of said contempt of this Court and its order of May 13, 1971.
>
> It is further ordered that the writ be stayed until April 23, 1973 and this cause be continued until April 24, 1973 at 9:15 a.m. at which time said respondent shall submit to this court and plaintiff counsel a plan by which respondent can comply with the May 13, 1971 order of this court subject to court approval.

Nowhere in the record does it appear that appellant had been given an opportunity for a hearing or for presentation of any evidence.

On April 24, 1973, appellant filed an Answer to Rule to Show Cause which contained an allegation that he was seeking to operate an auto recycling business and that he proposed to erect a 2,000 square foot building on the property in question to house the parts from re-cycled automobiles.

Brosten further alleged that he was appearing before the City Council on April 19, 1973 to request a building permit for the initial structure and that he would be able to remove all existing cars within one year after completion of said building. The petition alleged that after the building is built all future purchases could be dismantled within one week in shielded areas and the scrap frames left behind would be removed within ten days after entering the said premises.

The answer further alleged that if the building permit is not issued pursuant to the plans drawn appellant will file suit for mandamus for the issuance of a building permit pursuant to the Court approved site plan.

Brosten then prayed:

A. That the Court study the proposed plan.

B. That the Court inspect the premises.

C. That the Court stay all proceedings until the defendant's proposed plan is implemented and that the Court direct that a building permit be issued to the Defendant.

D. That the Court adopt a site plan within a reasonable time to satisfy the provisions of this Court's Decree. (Tr. C46-C48)

An order entered by the Hon. Fred H. Geiger on the same day the Answer to the Rule was filed allowed respondent until May 30, 1973, to do the following:

> 1. Respondent Hy Brosten et al shall cause the removal of at least 100 tons of wrecked, dismantled automobiles, batteries, tires, rubber, debris or parts automobiles or vehicles per week and submit a report or evidence of same on said May 30, 1973 aforesaid.
>
> 2. Respondent shall not permit any wrecked, dismantled automobiles or other material as aforesaid to be brought on the premises described in the Decree of May 13, 1971. (Tr. C-50)

Again, no opportunity for appellant to have a hearing was allowed.

On June 13, 1973, the following order was entered:

> All parties in open Court in person and by their respective attorneys—Defendant Hy Brosten has submitted to the Court an Agreement purging himself from contempt—Order of Commitment is vacated and set aside—Order finding Defendant in contempt ordered to stand in full force and effect until 120 working days from this date—Court and attorneys will view premises in question on October 10, 1973. Cause is hereby continued until October 10, 1973, at 9:15 a.m., in C-304 before Judge Geiger—Defendant released from custody. (Tr. C-52)

On July 12, 1973, appellee filed a petition requesting that Hy Brosten be committed to the custody of the Sheriff of Lake County for wilfully violating his proposal with Diamond Scrap Yards which was used to purge himself of the contempt order entered on April 2, 1973. (Tr. C-54)

On August 2, 1973, appellant was ordered to submit through his attorney a weekly report of the amount of tonnage or wrecked, dismantled automobiles or other material

removed from his premises and that appellant prepare the premises to facilitate the Court preparing guidelines to delineate the area to be cleared by Diamond Scrap Yards. (Tr. C-62)

On September 10, 1973, an order was entered that all wrecked and dismantled automobiles be removed by October 10, 1973, and that the attorneys for the parties meet at the site in question on October 10, 1973. (Tr. C-65)

On October 10, 1973, the Hon. Fred H. Geiger entered an order reciting that he had viewed the premises on May 31, 1973, and October 10, 1973, and finds as follows:

> 1. That the Mandatory Writ of Injunction issued pursuant to Decree aforesaid had not been complied with.
>
> 2. That the Defendant has had adequate notice and sufficient time and opportunity to comply with said Mandatory Writ of Injunction issued pursuant to said Decree and said Defendant has not given any excuse to support his failure to comply with said Writ and Decree.
>
> 3. That the premises described in said Decree and Writ, aforesaid contains substantial amounts of wrecked, dismantled automobiles, batteries, tires, rubber, debris or parts of automobiles or vehicles.
>
> 4. That said Defendant has willfully and contemptuously failed to comply with the Decree of May 13, 1971, and the Orders of this Court.
>
> 5. That said conduct of the Defendant tends to embarrass or obstruct the Decree and Orders of this Court in the administration of justice, and tends to bring the administration of justice into disrespect.
>
> 6. That failure of the Defendant to comply with said Decree and Mandatory Writ of Injunction issued thereon is a direct contempt of this Court.

> It is therefore ordered that the Defendant, Hy Brosten be and he is hereby sentenced to the County Jail, Lake County, Illinois for three (3) months or such lesser period when said Defendant, Hy Brosten, might purge himself by complying with the Writ heretofore issued on January 30, 1973.
>
> It is further ordered on motion of William Holmquist, attorney for the Defendant, Hy Brosten, that said mittimus be stayed until 9:30 a.m. daylight savings time, Monday, October 15, 1973. (Tr. C67-C68)

On October 15, 1973, a notice of appeal was filed along with a motion to stay the imprisonment of the defendant and admit him to bail pending said appeal. (Tr. C-70)

The question presented was presented to the court below in terms of criminal contempt. The Appellate Court of Illinois evaded the issue by holding that the petitioner was held in civil contempt. We submit that regardless of what the proceedings are called the petitioner is threatened with imminent imprisonment or loss of valuable property right and that due process was not afforded to him in any of the proceedings in the trial court.

Reasons for Granting Writ

The proceedings under which the petitioner here was adjudged guilty of contempt and sentenced to a term of imprisonment, completely violated all of the safeguards contained in the first eight amendments of the Constitution of the United States and made applicable to the States through the due process clause of the XIVth Amendment.

This case presents the important question of the application of the rights contained in the Bill of Rights in civil contempt proceedings.

Originally the plaintiff in the case filed a petition for a rule to show cause on March 8, 1973. As a result of that petition an order was entered stating: "that a rule be and is hereby entered on the defendant Hy Brosten d/b/a Hy-Way Sales to show cause why he should not be held in contempt of this court for his failure to comply with the writ of injunction heretofore issued and served on said defendant in this cause."

On April 2, 1973, an order was entered which stated that the petitioner here "failing to show cause why he should not be held in contempt, and the court finding that said Hy Brosten is in contempt of the order of this court" ordered him confined to the county jail until he purges himself of that contempt of court. A further part of that order stayed the execution of "the writ" until April 23, 1973, and required petitioner to submit a plan by which he could comply with the original injunction. (C 44)

There was no report of proceedings on this date and the next proceeding took place on April 24, 1973, at which time the petitioner appeared with an attorney and filed an

answer to the rule to show cause. At which time the following colloquy took place between counsel for the plaintiff and the court:

> Mr. Snarski: I have examined the answer, your honor, and I'd like to just make this as a preliminary statement. I think rather than calling it an answer, it should be entitled to "Plan" because we're past the stage of a rule to show cause now.
>
> The Court: That is right. He has been held in contempt and all I need is for the sheriff to take him to jail now. (Tr. 3)

The proceedings of April 24, 1973, resulted in the court granting petitioner time to comply with the original injunction order which required the removal of junk automobles from his automobiles salvage lot. (Tr. 17)

The next reported proceedings were on May 30, 1973, at which time petitioner appeared without counsel and brought along a man by the name of Coleman who gave some testimony as to the results of his attempts to remove the junk automobiles. (Tr. 19-35)

On June 12, petitioner appeared with another attorney and attempted to introduce the testimony of Bernard George Murphy (Tr. 39, et seq.) who testified that he was the mayor of Park City, the plaintiff. Petitioner attempted to prove by the witness that he tried to obtain the license that was the cause of the litigation in the first place and that the City Council of Park City refused to issue the license as long as the case was in litigation.

Here we see petitioner being faced with the "Catch 22" situation. He was under an injunction forcing him out of business until he could comply with the licensing laws of the City of Park City. The court was insisting upon putting him out of business regardless of whether he was at-

tempting to obtain the license required. Ultimately, under this situation, if he completely went out of business and cleaned the junk automobiles off of his lot, the City Council of the City of Park City would have entertained his application for a license, which by time would have been rendered useless by the Court's unreasoning efforts to vindicate its authority.

The proceedings here show that the trial court was not trying to do justice. It was trying to enforce a decree without giving any consideration to any of the underlying causes for the issuance of the decree and at this point the plaintiff was taking a position that was also ill suited to the purposes of the original litigation.

After refusing to hear Mayor Murphy the Court then ordered the appellant to make further efforts to clean up the automobiles on his lot and continued the case again.

The next time the case was in Court was June 13, 1973. On June 13, the appellant presented a plan whereby a scrap company in Waukegan would cause the removal of the scrap metal from his yard and after having reviewed the plan the Court stated (Tr. 71):

> Let the record show that the agreement which was one of the methods the court had said was a means of purging himself from contempt at this time has been submitted to the court by the defendant Hy Brosten. That the commitment for the contempt is vacated and certified at this time; however, the order finding him in contempt is still in full force and effect and is continued and at the end of 120 days from this date, as the court stated, it will make an examination of both counsel. * * * And the court will then be satisfied whether or not a fair and honest effort has been made to abide by the terms of the order and with the assurances that Mr. Rubinson has made. I'm quite sure

> there will be a very, very obvious reduction in the amount of junk or junked automobiles or whatever in the area. 120 days from today.

On August 2, 1973, a petition was presented to the court by the plaintiff alleging that the appellant had refused to comply with the agreement to have the Diamond Scrap Yard, Inc. remove the junk automobiles from his premises. Petitioner filed an answer to the petition and certain proceedings were had at which time it was explained to the court that there was a disagreement between the appellant and the Diamond Scrap Yards as to which automobiles were to be removed first.

The reason for the disagreement was, simply put, that Diamond desired to remove some of the more accessible automobiles which were extremely valuable to the appellant not as scrap but as salvage. The appellant desired Diamond to start removing scrap from an area that contained parts of wrecked automobiles from which all of the salvagable items had been removed.

During the colloquy it was stated that the appellant had indeed caused to be moved over 129,000 pounds of scrap material. Apparently this did not satisfy the court even though no evidence was produced as to what would have been a reasonable amount.

Finally, on October 10, 1973, the Court without having heard any evidence, but having made personal inspection of the appellant's yard, sentenced him to 90 days in the county jail of Lake County "for your contemptuous acts and attitude."

The following colloquy was then had between the court and the appellant:

> The Court: * * * you are remanded to the custody of the sheriff of Lake County to be held until such time as your sentence has been served or if you can

purge yourself of the contempt prior to the expiration of the three months you will be released on the date that you purge yourself.

Mr. Brosten: May I ask you how I can purge myself, sir?

The Court: By removing the materials in compliance with the order.

Mr. Brosten: Sir, we moved over 430 tons. I think we've done real well. Sir, its easy to say remove that. I can say that in three words. But it takes a lot of work.

The Court: Mr. Brosten—

Mr. Brosten: Sir, I have not done anything illegal. May I say something here, sir?

It is apparent that the court refused to take into consideration any of the efforts made by the petitioner to try to comply with the injunction. It is further apparent that the appellant was operating in a sort of judicial never never land where he was not told what he would have to do to comply with the order, inasmuch as the only person who seemed to know what the court thought proper was the court itself.

Thus we return to the basic propositions that we started with at the beginning of this point. The petitioner has been imprisoned for contempt without knowing the nature of the charges. He was never adequately informed what the court desired in the way of action to comply with the injunction, there was never any opportunity afforded him to confront the witnesses against him for indeed there were none, and the court did not have any evidence before it upon which it could make a ruling. In short the proceedings in which the appellant was convicted take on the aspect of Alice in Wonderland and a Franz Kafka novel.

Conclusion

For the above and foregoing reasons a writ of certiorari ought to issue to review the judgment below.

Respectfully submitted,

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APPENDIX

APPENDIX

MR. PRESIDING JUSTICE THOMAS J. MORAN delivered the opinion of the court:

Defendant was held in contempt of court and sentenced to a term of 3 months "or such lesser period when said defendant * * * might purge himself by complying with the Writ (mandatory injunction) heretofore issued." On appeal, defendant claims: (1) that he was found guilty of criminal contempt; (2) that he was denied due process; and (3) that the trial court was without jurisdiction to enter the injunction upon which the contempt order is founded.

On May 27, 1969, the plaintiff filed its complaint alleging that the defendant was violating its junk yard ordinance. During trial, on May 13, 1971, a decree was entered in which the court found it had jurisdiction both of the parties and the subject matter and that the parties had entered into an agreed order. The court entered a permanent injunction against the defendant ordering him to cease operating a junk yard and to "clean up the premises" before November 1, 1972. A few days later, the defendant petitioned the court to rescind its decree. The court denied the petition. This Court stayed the injunction pending appeal and later affirmed the decree (6 Ill. App. 3d 474, app. den. 52 Ill. 2d 597). Upon remand, the trial court entered an order on January 30, 1973, directing the issuance of the writ of injunction pursuant to the May, 1971 order.

A review of the record reveals that on April 2, 1973, after a hearing on plaintiff's rule to show cause, defendant was found in contempt of court. He was sentenced

to jail until he purged himself of said contempt but the order was stayed to allow defendant time to submit to the court a plan by which he could comply with the injunction. On April 24, defendant submitted a plan which amounted to a continuation of his operation under a different arrangement. The proposed plan did not comply with the court's order for removal of junk. At this hearing there was entered an agreed order continuing the cause until May 30, at which time defendant was to submit a report showing a weekly removal of 100 tons of scrap and, additionally, show that no new scrap was being allowed into the yard. On May 30 it was determined that 120 tons, not 500 tons, of scrap had been removed. Defendant claimed that he was unable to remove the required amount because his property was under water; he invited the trial judge to inspect the premises. Court and counsel visited the premises on the following day. At the next hearing, June 12, the court reported on its visit, finding that while the south end of the property was under water, the north end, which contained several hundred dismantled cars, was not and that those cars could have been removed. Thereupon the court committed defendant to jail until he purged himself of contempt. The next day, defendant appeared before the court and stated that he had entered a contract with Diamond Scrap Yards for removal of the scrap. After hearing Diamond's representative testify that removal would take 120 days, the court vacated the commitment order and continued the case for 120 days. On August 2, defendant appeared and advised the court that because of a disagreement, Diamond was no longer removing the scrap. At this hearing, Diamond's representative testified that defendant was hauling in new junk. The court then ordered weekly reports and continued the matter until September 4. At the next hearing, September 10, the court, unsatisfied with defendant's progress, ordered re-

moval of all junk (as required under the injunction of May 13, 1971) by October 10, 1973, and further ordered that it would meet defendant and the attorneys at the premises on that morning. On October 10, after the judge and the attorneys visited the premises, the judge found that the north end of the property looked "just as loaded with automobiles" as it was four months previous. At this hearing, defendant called the attorney for the Lake County Forest Preserve who testified that a condemnation suit was filed against a portion of defendant's property located in the City of Waukegan and adjacent to the premises in question and that the District might work out an arrangement by which defendant could temporarily store the junk from the Park City property on the Waukegan parcel. He further testified, however, that defendant "has not ceased bringing in new junked cars to the yard, and until such time as he does that we don't see how he's ever going to get to the point where he can remove the ones he's got." It was at the conclusion of this hearing that the order appealed was entered.

Defendant contends that he was held in criminal contempt of court in violation of due process requirements accorded a criminal proceeding. Specifically, he maintains that he was denied the right to know the nature of the charge against him, the right to a hearing, the right to confront witnesses, the right to present evidence in his own behalf, and possibly the right to have his case heard by a jury.

Clearly, defendant was held in civil, not criminal contempt of court. The Illinois Supreme Court distinguished the two as follows:

> "Criminal contempt is conduct which is directed against the dignity and authority of the court or a

judge acting judicially, while civil contempt ordinarily consists of failing to do something ordered to be done by a court in a civil action for the benefit of the opposing litigant therein." *People ex rel. Kazubowski* v. *Ray,* 48 Ill. 2d 413, 416 (1971).

In *Board of Jr. College* v. *Cook County T. Union,* 126 Ill. App. 2d 418, 427-28 (1970), the court stated:

"* * * (A) useful test by which a civil contempt can be distinguished from a criminal one is the punishment imposed. When punishment is purely punitive: imprisonment for a definite term, * * * the contempt is said to be criminal. When punishment is a remedial or coercive measure: commitment of a contumacious party until he complies with the mandate of the court, * * * the contempt is said to be civil."

Here, the court found defendant in contempt, not to punish him but to make him comply with the order of the court. The court's intent to coerce, rather than punish, the defendant is manifested by the many opportunities allowed defendant to comply with the order and also by the fact that on a prior occasion defendant was released from jail upon presenting before the court a contract for removal of junk from his property in compliance with the court's order. Throughout these proceedings the trial court displayed remarkable patience and extended considerable effort on behalf of defendant.

The trial court imposed a term of three months or such lesser period of time as it may take the defendant to purge himself of contempt. Once again, defendant can avoid a jail term by merely complying with the order. The sentence imposed is, therefore, clearly coercive, not punitive.

Defendant claims that he was denied the right to know the nature of the charge against him, that he was not afforded a hearing, that he was not allowed to confront witnesses or to present evidence in his own behalf. This

argument in its entirety appears to be based on the defendant's dissatisfaction with the trial court for not allowing him to re-litigate the issues underlying the order of May 13, 1971, which enjoined him from operating a junk yard on the subject premises. Those issues were decided against the defendant, affirmed by this court and are *res judicata.*

The issue at bar is whether the defendant was in contempt of court for failing to comply with the order entered on May 13, 1971. That defendant did not know the nature of the charge against him is beyond comprehension; he was in court, told to clear his property and informed that the consequence for failing to comply with this order would be a jail term. Defendant presented proposals to the court as to how he intended to comply with the order. The charge was clear. Defendant had the option of complying or being held in contempt. He chose the latter. Similarly, there is no merit to defendant's contention that he was not afforded a hearing. He was given at least six hearings.

Defendant was allowed to confront witnesses and present evidence in his own behalf. In point of fact, however, several of his own witnesses testified that defendant was not complying with the court order in that he was continuing to bring additional scrap into the yard. Defendant objects, on appeal, to the trial judge's personal inspections of the junk yard but because such inspection was initially made at defendant's request, this issue, too, is without merit.

Defendant further argues that the court was without jurisdiction to enter the original injunction against him. This contention is nothing more than a circuitous and futile attempt to relitigate the original case. As we have

indicated, that issue was resolved by this court on a prior appeal.

Shortly after entry of the order appealed, defendant obtained a stay order from this court, which order, in part, set forth the following conditions:

"IT IS HEREBY ORDERED:

* * *

2. That pending the appeal of said Order, the Defendant be and he is hereby released on bail upon his own recognizance in the sum of $1,000.00.

3. That pending appeal the said Defendant is enjoined from moving wrecked or dismantled [sic] automobiles, batteries, tires, rubber debris or parts of automobiles or vehicles onto the property owned by the Defendant in Park City, Illinois, the subject matter of this litigation.

4. That said Defendant continue removal of the wrecked, dismantled [sic] automobiles and all other debris on said property on the same scale or better than he has done in the past three (3) months and furnish weekly reports of the tonnage removed to Attorney Eugene Snarski, 33 North County Street, Waukegan, Illinois, 60085, Attorney for Park City, Illinois. * * *"

During the pendency of the appeal, plaintiff filed a petition containing allegations to the effect that, subsequent to the entry of the above order, defendant has received additional junk onto his property and has failed to furnish weekly reports of removal of scrap "since February 1973 [sic]". The petition requests this Court or, in the alternative, the trial court to conduct a hearing to determine the appropriate relief and to vacate the stay order. In response, defendant filed a motion to dismiss the petition on the grounds

that laches has attached and, additionally, that this court lacks jurisdiction to direct the trial court to hold hearings on the petition. We have considered defendant's motion to dismiss and find it to be without merit. Our stay of proceedings was granted "until further order of this Court." This opinion finds against the defendant on the issues, therefore, plaintiff's motion to vacate the stay order, entered October 17, 1973, is allowed.

The remainder of plaintiff's petition presents a novel issue from a procedural aspect. The substantive law is clear. "All courts are vested with an inherent power to punish for contempt as an essential incident to the maintenance of their authority and the proper administration and execution of their judicial powers." (*People* v. *Javaras,* 51 Ill.2d 296, 299 (1972). Also see this court's opinion in *Stevens* v. *County of Lake*, Gen. No. 74-232, — Ill. App. 3d —— (1974).) Unclear is the method to be used to obtain evidence from which a determination of the issue may be made. This court, like most reviewing courts, is not physically equipped to receive and record evidence on the matters here presented. While this may create a certain frustration, it does not mean that we are necessarily estopped from invoking our power to punish for contempt. Contrary to defendant's claim, we are of the opinion that Supreme Court Rule 366(a)(5) (Ill. Rev. Stat. 1973, ch. 110A, §366(a)(5).) empowers this court to remand plaintiff's petition to the trial court for an evidentiary hearing. See also *In re Koome*, 82 Wash.2d 816, 514 P.2d 520 (1973).

It is therefore ordered that:

1. The motion to dismiss plaintiff's petition is denied;
2. The motion to vacate defendant's stay order is allowed;

3. The order appealed is affirmed and that portion of the decision is final.

4. A rule is hereby entered upon the defendant, Hy Brosten, d/b/a, Hy-way Sales, to show cause, if any he has, why he should not be held in civil contempt of this Court for failure to comply with its order of October 17, 1973. Said rule is returnable on December 27, 1974, at 9:30 a.m., before the Honorable Fred H. Geiger, or any other circuit judge of the Nineteenth Judicial Circuit, for the taking of evidence upon matters contained in plaintiff's petition (which is hereby transferred to said court) and responsive pleadings, if any.

5. Upon completion of such hearing, the pleadings and all evidence introduced shall be promptly transcribed and certified by the sitting judge and submitted to this Court for further proceedings for which purposes this Court retains jurisdiction.

6. A copy of this order shall be served upon the parties by certified mail and plaintiff's petition is continued pending execution of paragraphs 4 and 5 of this order.

GUILD, RECHENMACHER, J.J.—Concur